

PRIORITY HANDLING FOIA REQUEST

SUBJECT: (Optional)

FOI Exemptions (4) and (6)

REQUEST NUMBER
OGC Has Reviewed

FROM:

[Redacted], AGC
7D07 Hqs.

EXTENSION

7521

DATE SENT

2 June 1975

SUSPENSE DATE

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. Asst for Info/DDA
7C18 Hqs.

6/5 JS

Hal:

Forwarded herewith are copies of a memorandum on the application of exemption (b)(4) and another on exemption (b)(6). The Freedom of Information officers, the IRC Committee members, and others, I believe, would find these most helpful.

[Redacted Signature]

Associate General Counsel

RETURN TO:

PRIORITY HANDLING FOIA REQUEST

2 May 1975

OJCS #1496145

STATINTL

MEMORANDUM FOR:

SUBJECT : FOIA Exemption 552(b)(4) -- Commercial
Information Given in Confidence

CONCLUSIONS: This exemption protects "commercial" information, i.e., information pertaining to the making of a profit or the competitive position of persons or entities. The information must have been provided under an implied or explicit assurance of confidentiality by the Government. The decision maker who claims this exemption must reasonably believe that the person to whom the information applies would reasonably wish to withhold the information from public disclosure in order to protect a competitive interest. The exemption applies only to information obtained from persons outside the Government.

1. The information intended to be protected by this exemption is commercial in nature, i.e., pertaining to the making of profit by a person or entity. Brockway v. Dept. of Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974). In order to qualify for this exemption, information must pertain to the competitive position of persons and the information must have been provided to the Government under an implied or explicit assurance of confidentiality by the Government. Brockway, supra.; see also Bristol-Myers Co. v. F.T.C., 284 F. Supp. 745 (D.D.C. 1968), rev'd, 424 F. 2d 935, 938 (D.C. Cir. 1970), cert. denied, 400 U.S. 824 (1970); Souciev. David, 448 F. 2d 1067, 1078 (D.C. Cir. 1971).

2. An important consideration gleaned from the Committee Reports of both the House and the Senate dealing with the 1967 FOIA is that the exemption covers material which would customarily not be released to the public by the person from whom the Government obtained it. Thus it may be appropriate in certain instances to consult with the person who provided the information before deciding whether to assert a claim of the exemption. A.G.'s 1967 FOI Mem. 34. Where such consultation is not practical, the Agency decision maker should place himself in the shoes of the person who provided the information and of the person to whom the information applies in order to decide whether such person or persons would reasonably wish to withhold the information from the public in order to protect his competitive position. If such person or persons would, and the other requirements and guidelines contained in this memo are met, a prima facie test for the claim of exemption 4 has been met.

3. The following types of information usually would fall within the "commercial" requirement of the exemption. This list is not meant to be all inclusive: Business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, negotiation positions or requirements in labor-management mediations, formulae, designs, drawings, research data, technical data, business or financial information submitted in or with an application for a research grant or loan or in or with a report while research is in progress. A.G.'s 1967 FOI Mem. 32.

4. This exemption is not normally meant to be applied where merely a list of names of applicants or contractors has been requested unless some substantial "competitive interest" of those persons would be protected by withholding the same. A.G.'s 1967 FOI Mem. 32.

5. To meet the requirements of exemption 4, the information must be "obtained from a person outside government." Brockway, supra., at 740. Thus, sourcing of the information becomes extremely important in a claim of exemption 4. Agency knowledge of the information must be traceable to a person outside the Government for the exemption to apply.

6. I have reviewed Para 3(b)(4) of Agency Implementation of the Amended Freedom of Information Act and find it accurate and to the point. Two alternative administrative options, not mutually exclusive, are (a) dissemination of the contents of paras 1-5 of this Memo to appropriate offices and (b) the inclusion of the Conclusions section of this Memo into the above Para 3(b)(4).

J.C.

5 May 1975

STATINTL MEMORANDUM FOR:

SUBJECT : Freedom of Information Act Exemption 552(b)(6) -
Protection of Privacy

CONCLUSIONS

The key to the application of exemption (6) to any request lies in the balancing of a particular reason or reasons for nondisclosure touching upon the right of privacy against the specific public interest in disclosures. This balancing inherently involves the use of judgmental discretion even more so than in applying the other 8 exemptions. However, the following guidelines may be of assistance: (a) If the release of the information might reasonably be said to harm an individual or his close relatives, the exemption may be claimed; (b) If the person to whom the information refers might reasonably wish to withhold it from the public because of its intimacy or possible adverse effects, the exemption may be claimed; (c) It is irrelevant to the claim of this exemption what label the Agency has placed on a particular file; (d) The exemption does not apply to information relating to non-individuals, e.g. corporations; (e) If a promise of confidentiality has been made specifically and as a matter of Agency practice (rather than in response to a request) in receipt of information otherwise classifiable under this exemption, the promise significantly strengthens the claim of this exemption; (f) Disclosure of information about a person to that person does not constitute an invasion of his privacy, but if the records requested concerning the requester cannot be segregated so as to delete all information pertaining to the exemptible privacy interests of others the request in toto may be denied under this exemption.

1. Exemption 6 is intended to protect personal privacy from clearly unwarranted invasions. As such, its application inherently involves the use of more discretion by the Agency than certain of the other exemptions in balancing the individual's rights against the public's interest in having the material available. A.G.'s 1974 FOI Amdts. Mem.

2. A number of general guidelines for withholding information under this exemption have already been established:

- (a) The exemption can be used to protect relatives, descendants and members of the family of the person to whom the information pertains as well as the latter person himself.
A.G.'s 1967 FOI Mem.
- (b) Very little stress should be placed on the phrase "similar files" in attempting to discover whether non-personnel/medical files are so akin to the former that they fall within the exemption. Materials in any file which relate to the protected right of personal privacy are withholdable. Wine Hobby USA, Inc. v. United States Internal Rev. Serv., 502 F. 2d 133 (3d Cir. 1974); cf. Robles v. Environmental Protection Agency, 484 F. 2d 843 (4th Cir. 1973).
- (c) The courts have not yet tested the question of whether the exemption applies to information relating to corporations or other non-individuals, but indications are that the exemption only applies to information relating to individuals. A.G.'s 1974 FOI Amdts. Mem.; Robles, supra.
- (d) The exemption has been stated to apply to "intimate details" of "a highly personal nature." Robles, supra; Note, Invasion of Privacy and the Freedom of Information Act; Getman v. N.L.R.B., 40 Geo. Wash. L. Rev. 527, 532 (1972).
- (e) The exemption can probably consistently be used to withhold information "which might harm the individual." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The Agency apparently would have a special charter in this area because of its authority to conduct clandestine operations, to withhold information relating to the association of persons with the Agency (in addition to its "sources and methods" protective charter). In this regard the DDO would be well-advised, to be able to sustain a claim of this exemption in the litigation context, to begin developing statistical surveys of harm done to persons whose association with the Agency was revealed.
- (f) Where a promise of confidentiality has been made as a business practice at the time the information was gathered, i.e. not solely in response to a request for confidentiality, and the information has been held in confidence, and all of the above can be documented, it will be taken into account by the courts in evaluating a claim of the exemption, but is not conclusive. Robles, supra.

- (g) Withholding of information under this exemption is probably justifiable in all cases where the person referred to or his close relatives reasonably would not wish to have the information made public because of its intimacy or possible adverse effects upon himself or his family. See A.G.'s 1974 FOI Amdts. Mem. 9, 10. Thus an effective philosophical approach in asserting the exemption might be to place one's self in the position of the person referred to and ask, 'Are there logical reasons why I would not want to make this information public?' If the answer is yes, withhold.
- (h) Even though "disclosure of information about a person to that person does not constitute an invasion of his privacy," if the records requested concerning the requester cannot be segregated so as to delete all information affecting the privacy interests of others, a strong argument can be made that the request in toto should be denied under exemption (6). See A.G.'s 1974 FOI Amdts. Mem. 10.
- (i) Any particular reason for non-disclosure which touches upon the right of privacy must, in the final analysis be weighed against the specific public interest in disclosure. This balancing process, which is the key to the exemption, makes every case in this area a judgment call. Hopefully, this memo will provide what little help can be gleaned from the cases and materials in making those calls.

3. I find section 3b(6) on exemption (6) in Agency Implementation of the Amended Freedom of Information Act entirely accurate and to the point. Two suggested alternatives would be (a) the dissemination of this memo (para. 2 (a)-(i)) to appropriate offices or (b) amending section 3b(6) by adding the Conclusions section of this memo to the former.

J.C.

STATINTL

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ROUTING AND RECORD SHEET

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FOI Exemptions (4) and (6)

EXTENSION

NO.

1496/75

DATE

6/6/75

TO: (Officer designation, room number, and building)

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OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

STATINTL

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Copies to son Div. ? ^{Yes} _{Done 6/6/75}

These exemptions from deal with two areas

- 1) Non Disclosure type info from companies
- 2) Matters of Personal Privacy

file FOIA